Before the

Federal Communications Commission

Washington, DC 20554

In the Matter of	)	
	)	**WC Docket No. 17-108**
Restoring Internet Freedom	)	

REPLY COMMENTS OF THE GOVERNMENT OF THE DISTRICT OF COLUMBIA

The Government of the District of Columbia, acting through its Office of Chief Technology Officer ("the District), submits these reply comments in response to the Commission's *Notice of Proposed Rulemaking* ("*NPRM*") in this docket.[1] As discussed below, a wide range of commenters, including nearly all of the largest broadband service providers, agree with the District that a free and open Internet is of vital importance to our nation and that "bright line" rules are necessary to protect a vibrant and open Internet. Some of these providers suggest that Commission can promulgate and enforce such rules without reclassifying broadband Internet access service ("BIAS") as a Title II "telecommunications service," by relying upon its Section 706 authority or by [FTC]. The District disagrees and will show below that reclassification remains the only viable way for the District to enforce the open Internet rules.

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1 *In the Matter of Protecting and Promoting the Open Internet*, WC Docket No. 14-28, *Report and Order on Remand*, *Declaratory Ruling and Order*, 30 FCC Rcd 5601 (2015), 2017 WL 2292181 (F.C.C.). Following the Commission lead in the *NPRM*, the District will refer to this order as the "*Title II Order.*"

I. THE GOALS OF AN OPEN INTERNET CAN ONLY BE ACHIEVED THROUGH ENFORCEABLE RULES

A. Broad Support for Open Internet Rules

Despite the large number of different positions in this proceeding, an overwhelming majority of commenters supports a free and open Internet. As the District observed in its opening comments, this is so because broadband, like electricity, is a transformative enabler and platform for access to myriad essential technologies and services touching and undergirding nearly every facet of American life as we move forward in the information age. This includes economic development and global competitiveness, education, public safety, health care, transportation, energy, environmental protection, government service, scientific research, entertainment, democratic discourse, and much more.

There is also widespread agreement and recognition from commenters as diverse as the National Cable and Telecommunications Association (NCTA) and Public Knowledge, that to maintain a free and open Internet, both core underlying principles and clear and enforceable rules of the road are necessary. The relevant principles are reflected in the "Internet Freedoms" that the Commission unanimously endorsed in its 2005 *Internet Policy Statement*. These freedoms included "the freedom to access lawful content, the freedom to use applications, the freedom to attach personal devices to the network, and the freedom to obtain service plan information."[2]

Significantly, all of the large broadband Internet service providers and their trade associations express a willingness to comply with the specific principles and underlying rules embodied in the *Internet Policy Statement* and in the *Title II Order*.[3] For example, AT&T states,

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2 *NPRM*, at ¶ 13, citing the *Internet Policy Statement*.

3 *In the Matter of Protecting and Promoting the Open Internet*, WC Docket No. 14-28, *Report and Order on Remand, Declaratory Ruling and Order*, 30 FCC Rcd 5601 (2015),

AT&T supports an open Internet, as do essentially all broadband ISPs. We supported the open Internet principles adopted by the Commission in 2005. We supported the original *Open Internet Order* adopted under Chairman Genachowski's leadership in 2010. *We continue to support a reasonable regulatory or legislative framework that is calibrated to protect an open Internet* without undermining investment and innovation incentives. And regardless of what regulatory regime is in place, we will conduct our business in a manner consistent with an open Internet. Our customers demand no less.

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AT&T would support a set of bright-line rules that require transparent disclosures of network-management practices and prohibit blocking and throttling of Internet content without justification under appropriately flexible principles of reasonable network management. Such rules are acceptable because they reflect long-standing industry norms and are thus essentially cost-free.[4]

Similarly, Verizon states,

[W]e believe there should be guiding principles in the following areas:

- **Transparency**: We support rules that require providers to tell customers what the provider's policies and practices are.
- **Blocking**: We support rules that prevent providers from blocking lawful content, applications, or services.
- **Throttling**: We support rules that prevent providers from intentionally slowing down or throttling Internet traffic based on the traffic's source, destination, or content.
- **Paid prioritization**: We support rules that prevent providers from charging content suppliers a fee to deliver their Internet traffic faster than the Internet traffic of others where the result is harm to competition or consumers.
- **Reasonable network management**: We support rules that recognize that providers can manage their networks efficiently.

We think these principles are a reasonable and balanced approach to get at the heart of the issue while still encouraging growth and investment.[5]

Comcast vigorously concurs,

Comcast strongly supports the vital tenets of Internet freedom aptly encapsulated in the NPRM—namely, that "consumers should have access to the content,

2017 WL 2292181 (F.C.C.). Following the Commission lead in the *NPRM*, the District will refer to this order as the "*Title II Order.*"

4 AT&T Comments, at 1 and 101 (*emphasis* added).

5 Verizon comments, at 4.

> *applications, and devices of their choosing as well as meaningful information about their service*, all without deterring the investment and innovation that has allowed the Internet to flourish." As discussed above, these principles are central to Comcast's commitment to meeting the needs and expectations of its broadband customers, and Comcast will continue to adhere to them regardless of the legal framework the Commission puts in place.
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> [*T*]*the Commission can safeguard the free and open Internet through several different measures, including, consistent with the D.C. Circuit's* Verizon *decision, promulgating new bright-line rules* under Section 706.
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> Comcast and other ISPs have explained in a recent joint statement that "[a]n open internet means that we do not block, throttle or otherwise impair your online activity." And "[w]e firmly stand by that commitment because it is good for our customers and good for our business." *Consistent with that promise, Comcast will continue to support the principles of ensuring transparency and prohibiting blocking, throttling, and anticompetitive paid prioritization*, as we have previously.[6]

B. Only by Treating BIAS as a Title II "Telecommunications Service" Can the Commission Enforce Its Open Internet Rules and Principles

While the key industry stakeholders in the Net Neutrality debate claim to be willing to comply with the specific "bright line" rules and principles that the Commission adopted in its *Internet Policy Statement* and the *Title II Order,* they uniformly object to the Commission's reliance upon Title II to support those rules and principles. Instead, they suggest that the Commission has ample authority to enforce such rules pursuant to Section 706 and the Commission's Title I ancillary authority. Alternatively, they suggest that the Federal Trade Commission ("FTC") is well suited to enforcing such rules. These suggestions are incorrect. None of these alternatives to Title II classification provides a sufficient degree of legal certainty to support the enforcement of the open Internet rules that the carriers profess to support.

[6] Comcast comments, at 50, 51 and 53 (internal citations removed)(*emphasis* added).

1. Neither Section 706 Nor the Commission's Ancillary Authority Provides a Sufficient Legal Basis for Open Internet Rules

Broadband providers such as AT&T, Comcast, and Verizon argue that the Commission can rely on its Section 706 authority, coupled with its ancillary authority under Section 4(i), to adopt open Internet rules. They suggest that the *Verizon* court[7] provided a "roadmap" for the Commission to use these authorities to reinstate the Open Internet rules.[8] These arguments are incorrect, as neither the courts, nor the carriers themselves, believe that these authorities provide a sufficient legal basis for the Commission to adopt and enforce meaningful open Internet rules.[9]

Any effort to fashion new rules that would achieve the non-discrimination goals of the Internet Policy Statement without imposing common-carrier requirements would introduce a new level of regulatory uncertainty, and would inevitably be subject to lengthy and costly legal challenges by the very carriers that are now suggesting that the Commission rely on its Section 706 and ancillary authority.

Assertions by carriers such as Comcast and Verizon that they would comply with any such open Internet rules promulgated under Section 706 ring particularly hollow, given their track record of challenging these rules. Indeed, the very cases that led the Commission to conclude that only Title II reclassification could ensure effective enforcement of the Open Internet rules all bear the names of the carriers that are now urging the Commission to rely on the sources of authority they vehemently discredited. Their record of past court challenges, as well

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7 *Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014) ("*Verizon*").

8 AT&T comments, at 102; Comcast comments, at 51 and 59.

9 To be sure, two of the three judges on the *Verizon* court suggested that the Commission might be able to develop Open Internet rules that would not impose common- carrier obligations on providers of BIAS. But these suggestions were at most speculative dictum, not opinions addressing actual rules that had been developed on a full record. Nor could they even persuade the third judge to join them, let alone provide assurance that a different panel years later would uphold such rules.

as the their comments in this proceeding, all strongly suggest that the carriers will continue this pattern and challenge all but the most superficial of Open Internet rules.

Faced with the choice of injecting yet another round of regulatory uncertainty into the marketplace by attempting again to thread the Section 706/ancillary authority needle, or to follow the more stable and certain reclassification alternative that the *Verizon* court also suggested, the Commission reasonably concluded in its *Title II Order* that a common carrier classification was the better approach. The *USTA* court's decision upholding the Commission's embrace of the Title II reclassification validates the Commission's decision to forgo reliance on Section 706 alone.

Moreover, the principle of non-discrimination lies at the heart of most of the Open Internet rules adopted in the *Title II Order*. Effective enforcement of that principle necessarily requires treating providers as common carriers. The comments of Free Press forcefully make the point, arguing that the adoption and enforcement of open Internet rules clearly requires a Title II common carrier classification.

> A prohibition on unreasonable discrimination that applies to a broadband carrier's transmission of any and all content, and to its interactions with its actual end-user customers, is a prohibition that can only be applied to common carriers. The *Verizon* court in 2014, writing before reclassification the following year, had "little hesitation in concluding that the anti-discrimination obligation imposed on fixed broadband providers has 'relegated [those providers] . . . to common carrier status.'" The court merely confirmed what we've known all along to be true: nondiscrimination, which is the entire point of Net Neutrality, is a common carrier obligation. This means that the Commission cannot adequately protect Net Neutrality without using Title II authority.[10]

A closer review of the comments from industry underscore this very point. For example, while Verizon suggests the use of Section 706 as a substitute for Title II common carrier classification, it also argues that any open Internet rules adopted under Section 706 "may not

[10] Free Press comments, at 40 quoting *Verizon* at 655.

replicate Title II," and that the "Communications Act 'expressly prohibits' the Commission from imposing common-carrier regulations on entities that are not common carriers."[11] Thus, far from arguing that Section 706 is a broad source of authority to ensure compliance with essential open Internet rules, Verizon essentially indicates that it may be useful tool to address certain issues and abuses, stating that "it may be that interpreting Section 706 as a 'grant of regulatory authority' *for certain open Internet rules would provide the Commission with a means of curbing some problematic practices*."[12] This is hardly a ringing endorsement of Section 706 as a bulwark for the many protections that the open Internet rules are intended to guard against.

AT&T similarly qualifies the extent to which Section 706 could actually be utilized to enforce open Internet rules, arguing.

> If the Commission relies on section 706 as a source of rulemaking authority, however, it should observe three critical limiting principles. *First*, as the *Verizon* decision illustrates, section 3(51) of the Communications Act prohibits the Commission from imposing common carriage.
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> *Second*, to the extent that section 706 authorizes the Commission to regulate broadband network practices, it does so only insofar as the Commission has a strong empirical basis for concluding that such regulation is necessary to promote broadband investment by ISPs.
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> *Third*, any exercise of section 706 authority must avoid raising First Amendment concerns.[13]

Thus, it is clear that the carriers themselves recognize that the Commission's regulatory authority under Section 706 is subject to significant limitations, all of which would severely undercut, if not completely render meaningless, the types of protections that are necessary to ensure a free and open Internet.

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11 Verizon comments, at 18.

12 Verizon comments, at 18 (*emphasis* added).

13 AT&T comments, at 104-105.

Adopting open Internet rules under the Commission's "ancillary authority" would fare no better. As the D.C. Circuit held in the *Comcast* case,[14] the Commission could not treat BIAS as an "information service" and enforce its *Internet Policy Statement* against Comcast pursuant to its "ancillary jurisdiction" under Section 4(i) of the Communications Act, as the Commission had "failed to identify any grant of statutory authority to which the order was reasonably ancillary."[15]

Based on the above, it is clear that neither Section 706 nor the Commission's ancillary authority, either taken alone or in concert, provide the Commission with a sufficiently reliable source of authority to adopt and enforce meaningful open Internet protections. It would therefore be against the public interest, arbitrary, capricious, and irrational for the Commission to reverse the reclassification provisions of the *Title II Order* and revert to treating BIAS as an "information service."

2. The FTC Lacks Adequate Resources and Expertise to be the Primary Regulatory Backstop of Ensuring an Open Internet

The Commission should also reject suggestions by carriers such as Verizon and Comcast that the Commission should abdicate its responsibilities and instead rely on the enforcement authority of the Federal Trade Commission (FTC). For example, Verizon argues that the FTC has authority to protect consumers from "unfair or deceptive acts or practices in or affecting commerce,"[16] and that the FTC could develop "a framework to allow the agency to enforce the policies underlying the *Title II Order*, insofar as those policies are justified by actual market conditions."[17]

14 *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) ("*Comcast*").

15 *Comcast* at 644.

16 15 U.S.C. § 45(a)(2).

17 Verizon comments, at 17.

While it is true that the FTC has expansive consumer protection authority, this authority is primarily related to issues of competition. Indeed, Verizon's own statement about "market conditions" reflects this focus. In contrast, the Commission has a broader mandate to protect the public interest. Moreover, the FTC is not the expert agency in this area, and it lacks jurisdiction over common carriers.[18] As a result, it makes little sense to take rules and policies developed over time by an expert agency and place them in another agency that has neither the statutory authority, nor the institutional knowledge of the relevant rules and policies, nor the dedicated staff and resources to take on this regulatory obligation, nor the ability to enforce these rules against a significant part of the broadband market.

II. NO COMPELLING REASONS EXIST TO REVERSE THE *TITLE II ORDER*

Other commenters concur with the District that the Commission has not put forward sufficient grounds as a matter of law to justify reversing the *Title II Order* and reclassifying BIAS as an information service. As the City and County of San Francisco observe, the Commission, like other federal agencies, does not have unfettered discretion to change its policy positions. Citing *F.C.C. v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009), the City and County of San Francisco note that the United States Supreme Court requires that, when a "new [agency] policy rests upon factual findings that contradict those which underlay its prior policy" the agency must provide a "detailed justification" for the new policy. "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is

[18] Section 5(a)(2) of the Federal Trade Commission Act authorizes the FTC to "prevent persons, partnerships, or corporations, *except* . . . *common carriers* subject to the Acts to regulate commerce . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce" (emphasis added).

needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[19]

This same heightened standard for an agency reversing a prior policy was articulated by the D.C. Circuit in upholding the *Title II Order*.

> As US Telecom points out, the Supreme Court has held that "the [Administrative Procedure Act] requires an agency to provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.'"[20]

In upholding the Commission's *Title II Order* the D.C. Circuit carefully examined each of the Commission's main findings and determined that those findings met the heightened standard. In contrast, it does not appear that the Commission has not put forward a sufficient basis for reclassification in the *NPRM* to meet this heightened standard. As the City and County of San Francisco argue, while the Commission attempts to justify its reversal of the *Title II Order* based on its finding that the classification of BIAS as a telecommunications service has led to decreased investment in broadband infrastructure since 2015, that finding, however, is not fully supported by the lone study the Commission relies upon in the *NPRM*,[21] and is expressly rejected in a study by Free Press that the Commission cites but does not discuss.[22]

The District agrees with the City and County of San Francisco, that contrary to the findings in the *NPRM*, the best evidence in this record is that the prior Commission's "predictive judgments" were correct – specifically that classification of internet service as a

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[19] City and County of San Francisco, at 8, citing *F.C.C. v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009).

[20] *USTA v. FCC*, 825 F.3d at 707 (citations omitted).

[21] *NPRM* at ¶ 45 citing a study by Hal Singer of George Washington University, *NPRM* at ¶ 45.

[22] *NPRM* at ¶ 45 citing a study by Free Press, *Internet Service Providers' Capital Expenditure*s (Feb. 28, 2017).

telecommunications service, when coupled with light touch regulatory forbearance, would not undermine investment and innovation, and therefore the Commission does not have sufficient legal grounds to reverse its *Title II Order*.

IV. CONCLUSION

For all of the foregoing reasons, the District renews its request that the Commission maintain its current open Internet rules and principles, including its decision in the *Title II Ord*er to treat BIAS as a Title II telecommunications service.

Respectfully submitted,

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